Supreme Court, U. S.
FILED
AUG 24 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Number 79-301

R & T CONSTRUCTION COMPANY, INC.,

and

DARREL S. PITTS,

Petitioners,

vs.

ST. LOUIS - SAN FRANCISCO RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bert S. Nettles
Post Office Box 2232
Mobile, Alabama 36601
(205) 432-8786
Attorney for Petitioners

INDEX

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutes and Federal Rules Involved 2

Statement 3

Reasons for Granting the Writ 6

Conclusion 11

Certificate of Service 12

Appendix A - Opinions of Court of Appeals

Appendix B - Opinions of United States District Court

TABLE OF AUTHORITIES

CASES:

American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951) 8

Callaway v. Adams, 252 Ala. 136, 40 So.2d 73 (1949) 11

Fong Foo v. United States, 369 U.S. 141 (1962) . . . 7

Glidden v. Zdanok, 370 U.S. 530 (1962) 7

Linkletter v. Walker, 381 U.S. 618 (1965) 7

Louisville & Nashville Railroad Co. v. Williams, 370 F.2d 839 (5th Cir. 1966) 11

N.L.R.B. v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970) 3, 6

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) 7

FEDERAL RULES:

Federal Rule of Evidence 704 . . . . . 2, 10, 11

Fifth Circuit Local Rule 18 8

Fifth Circuit Local Rule 21 . . . . . 2, 3, 6, 7, 8, 9

OTHER AUTHORITY

Report of the Commission on Revision of the Federal Court Appellate System, found at 67 F.R.D. 195 (1976) 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Number

R & T CONSTRUCTION COMPANY, INC.,

and

DARREL S. PITTS,

Petitioners,

vs.

ST. LOUIS - SAN FRANCISCO RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 24, 1979, and the denial of rehearing entered on May 30, 1979.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit wrote no opinion in denying Petitioners' petition for rehearing and petition for rehearing en banc. The notice of these denials, dated May 30, 1979, received by Petitioners, appears in Exhibit "A".

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court without opinion on April 24, 1979, and that affirmance appears at 594 F.2d 862 (5th Cir. 1979). The affirmance without opinion appears in Appendix A.

The United States District Court for the Southern District of Alabama denied Petitioners' Motion for New Trial without opinion by merely writing the words "Motion Denied" on the face of the Motion for New Trial. The Motion for New Trial with "Motion Denied" written across its face appears in Appendix B.

The United States District Court for the Southern District of Alabama wrote no opinion after trial of this matter and merely entered a judgment on the verdict returned by the jury. That judgment appears in Appendix B.

JURISDICTION

The affirmance without opinion by the United States Court of Appeals for the Fifth Circuit, which appears in Appendix A, was entered on April 24, 1979. Petitioners' petition for rehearing and petition for rehearing en banc were denied on May 30, 1979. Appendix A. The petition for writ of certiorari was filed

less than ninety days from the date rehearing was denied. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does Local Rule 21 of the United States Court of Appeals for the Fifth Circuit, which allows a case to be affirmed without opinion: (a) unduly minimize a litigant's opportunity to challenge an adverse decision, (b) impair the ability of the Supreme Court of the United States to gain the insight necessary to monitor functioning of the Court of Appeals and the propriety of its decisions, or (c) thwart a primary function of the appellate process to furnish a guide to the bench and bar in future cases?

2. Was the Trial Court's exclusion of expert opinion testimony on the grounds that such testimony invaded the province of the jury contrary to Federal Rule of Evidence 704?

STATUTES AND FEDERAL RULES INVOLVED

Federal Rules of Evidence, Rule 704:

> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Rules of the United States Court of Appeals, Fifth Circuit, Rule 21:

> "When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, or (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and the Court also determines that

no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

"In such case, the Court may in its discretion enter either of the following orders: 'AFFIRMED. See Local Rule 21,' or 'ENFORCED. See Local Rule 21.'

"See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

"Added July 1, 1970, and amended Oct. 20, 1978."

STATEMENT

This action involves a collision between a train of the St. Louis - San Francisco Railway Company (hereinafter called "the Railroad") and a truck owned by R & T Construction Company (hereinafter called "R & T") and driven by Darrel S. Pitts (hereinafter called "Pitts"). The Railroad filed its complaint in the United States District Court for the Southern District of Alabama on June 20, 1977, alleging that R & T and Pitts were negligent and/or wanton in operating the truck which collided with the train. (R. 1 - 2).

R & T and Pitts answered the Railroad's complaint alleging that the Railroad was guilty of negligence contributing to its own damages. (R. 8 - 9). R & T and Pitts also filed counterclaims against the Railroad alleging that it was negligent and/or wanton in maintaining the crossing where the collision occurred. (R. 14 - 17).

At the time of the collision, Pitts was employed by and was driving a truck owned by R & T and was hauling oil field pipe from a storage yard to a nearby oil well drilling site. (T. 616 - 620). The crossings where the collision occurred lay between the storage yard and the drilling site. Just prior to the collision, two R & T trucks, including the one being driven by Pitts, were loaded with pipe and, with several other vehicles, began the last trip of the day from the storage yard to the drilling site. (T. 619-

620). The other R & T truck crossed the railroad tracks first; and when Pitts attempted to cross the tracks, the collision with the train occurred. (T. 620-623). This was a seldom used crossing and, though Pitts had driven through the crossing many times, he had never seen a train at or near the crossing. (T. 624).

The crossing had been constructed by the Railroad in 1975. (T. 523). Even though there was testimony that there was restricted vision at the crossing, with the track emerging from an 8 to 10 foot cut with a dense growth of trees on top of the embankment just before the crossing (T. 491), the Railroad had not installed a gate or flashing light signal protection. (T. 504 - 505). It was estimated that between 700 and 1300 vehicles per day moved along the highway traversing this crossing. (T. 494).

R & T and Pitts alleged in their counterclaims that the crossing in question was unusually hazardous and that the Railroad was negligent and/or wanton in constructing and maintaining it in that condition. On the third day of trial, Mr. William Pipas was called by R & T and Pitts as an expert witness on railroad crossing safety standards and practices. Before Pipas took the stand, the Railroad raised several questions about Pipas' proposed testimony. (Beginning T. 446). The Court asked counsel for R & T if he were going to ask Pipas if the crossing was unusually hazardous, and counsel for R & T responsed that he was going to ask that question. Counsel for the Railroad immediately exclaimed that such testimony would go "to the very heart of this case", and the court agreed. (T. 450). After much discussion, the court agreed that Pipas was a qualified expert and that he could testify as an expert, but with certain crucial limitations:

"THE COURT:

"No, I am going to let you offer evidence, but I am not going to let him do this. I am not going to let him testify other than getting into this question of whether or not it was a dangerous or hazardous crossing. I really think it invades the province of the jury. He

can testify as to what is the custom and usage and what is to be at those crossings." (T. 462). (Emphasis added.)

* * * *

"THE COURT:

"Yes. And stay away from advanced warnings and stay away from crossings on the road. Stay away from the facts as to him making a judgment as to the hazardous and dangerous crossing. That is the heart of what the jury has to determine." (T. 466). (Emphasis added.)

After both sides rested, the court advised counsel that the issue of R & T's and Pitts' simple negligence would be taken from the jury and that he would hold as a matter of law that R & T and Pitts were contributorily negligent. (T. 635, 637). Closing arguments were then made (Beginning T. 665), the jury was charged (Beginning T. 728) and the jury was excused to deliberate. (T. 780). After deliberations, the jury answered the court's special interrogatories, finding that R & T and Pitts were guilty of wanton conduct which proximately contributed to the damages of the Railroad, that the Railroad was not negligent or wanton and assessing damages against R & T and Pitts at $490,000.00, and a jury verdict was returned for the Railroad in the amount of $490,000.00. (T. 784 - 786).

On March 3, 1978, R & T and Pitts filed a Motion for New Trial and Motion for Stay of Execution based in part on the Trial Court's refusal to allow the expert witness William Pipas to testify that in his opinion the crossing in question was unusually hazardous. (R. 338 - 339). This motion was denied without hearing on March 8, 1978.

On April 4, 1978, Notice of Appeal to the United States Court of Appeals for the Fifth Circuit was filed by R & T and Pitts. After extensive briefs were filed the appeal was placed on

the summary calendar whereby no oral argument was allowed, although requested by R & T and Pitts. The judgment of the Trial Court was affirmed without opinion under Local Rule 21. Petition for rehearing and petition for rehearing en banc filed by R & T and Pitts were denied without opinion.

Jurisdiction of the United States District Court for the Southern District of Alabama was invoked pursuant to 28 U.S.C. 1332.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS' PRACTICE OF AFFIRMING JUDGMENTS WITHOUT OPINION PRESENTS IMPORTANT QUESTIONS AS TO THE RESPECTIVE ROLES OF BOTH THE COURTS OF APPEAL AND OF THIS COURT IN THE ADMINISTRATION OF JUSTICE.

The United States Court of Appeals for the Fifth Circuit follows a practice of affirming certain judgments, verdicts and administrative orders without opinion. Pursuant to Rule 47 of the Federal Rules of Appellate Procedure, the Fifth Circuit has promulgated Local Rule 21 which authorizes this summary practice. Rule 21 operates when the court determines that one or more of the following circumstances exist: (1) that a judgment of the district court is based on findings of fact not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient, or (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole. If the court also determines in connection with the above that no error of law appears and an opinion would have no precedential value, no opinion is rendered. The Rule also directs parties to N.L.R.B. v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970), wherein the Fifth Circuit sets forth its rationale for adopting this Local Rule.

Local Rule 21 authorizes affirmance without opinion in the three categories of cases, if no error of law appears and an opinion would have no precedential value. Petitioners have contended throughout this appeal that the Trial Court made a basic error of law in not applying Rule 704 of the Federal Rules of Evidence; and since no order of an administrative agency or finding of fact by the Trial Court is involved in this case, and since no question of insufficiency of the evidence has been raised on this appeal, this particular case does not fall within any of the three categories of cases in which Local Rule 21 authorizes affirmance without opinion. This case is illustrative of one of the problems in the usage of Local Rule 21.

Additionally, it is Petitioners' position that this Local Rule 21 presents a significant hindrance to this Court's ability to properly supervise the administration of justice in the courts of appeal.

This Court has granted certiorari on many occasions where lower court practices posed substantial questions in the administration of justice. For example, in Linkletter v. Walker, 381 U.S. 618 (1965), certiorari was granted to resolve a conflict among the courts of appeal as to the retrospective application of one of this Court's search and seizure decisions. Certiorari was deemed necessary because the conflict created "a most troublesome question in the administration of justice". Id. at 620.

Similarly, certiorari was granted in Fong Foo v. United States, 369 U.S. 141 (1962), because the district court's practice of directing acquittals during the presentation of the government's case raised a "question of importance in the administration of justice in the federal courts". Id. at 142. And certiorari was granted to determine if immediate appeal lay from dismissal of some claims among multiple claims "because of the importance of the issue in determining appellate jurisdiction . . . ". Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 429 (1956). See also Glidden v. Zdanok, 370 U.S. 530 (1962),

where the procedure of designating judges of one court to sit in cases of another court was held to be a question of significance to the federal judicial system; and American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951), where certiorari was granted to review a removal question since "prompt, economical and sound administration of justice" depended upon a Supreme Court decision.

The Fifth Circuit's practice of affirmation without opinion presents a question of no less importance in the administration of the federal judicial system. While the rationale of the saving of judicial time is appreciated, the difficulties with summary affirmation are considerable. Local Rule 21 affects substantive rights, and is not merely an administrative or housekeeping tool. First, the reasoning of the court is shielded. The litigant thus has no meaningful opportunity to challenge an adverse decision, whether in drafting a petition for rehearing or in fashioning a petition for certiorari. The lower court and the bar receive no guidance to aid in future cases. Further, this Court's ability to scrutinize the court of appeals' decision on a petition or grant of certiorari is significantly diminished. Obviously, conflicts between circuits, within circuits, or with decisions of this Court go undetected.

Second, Local Rule 21 reduces public respect and confidence in the federal judiciary because it creates the impression of arbitrariness. The litigant who has spent thousands upon thousands of dollars in prosecuting an appeal is given no reason for the affirmance. The criminal defendant whose liberty is at stake does not have the benefit of articulated reasons for his incarceration. The fact that the Fifth Circuit denies or restricts oral argument in most cases (as was true in this instance) exacerbates the problem. See Fifth Circuit Local Rule 18. In general, the right of appeal ostensibly provided by Congress has been significantly minimized.

The problems created by the affirmance without opinion practice were studied by the Commission on Revision of the

Federal Court Appellate System. Its report was made in June, 1975, and is found at 67 F.R.D. 195 (1976). The Commission observed that opinion writing reflects certain values in the federal appellate process, namely:

> ". . . the necessity for a reasoned disposition to furnish a guide for district court judges and the bar in future cases, and the need to provide the Supreme Court with insight into the court of appeals' reasoning when the Justices consider petitions for certiorari."[1]

67 F.R.D. at 256. The Commission also noted that unexplained decisions may risk harm to public confidence in the judiciary. Thus courts should at least "issue memoranda so that they do not give the appearance to litigants of acting arbitrarily, and so that litigants may be assured that the attention of at least one judge was given to the case". Id.

The Commission therefore recommended there be some record, however brief, of the court's reasoning in every case. Mere citation to precedent, informal memoranda, unsigned and brief per curiam opinions were suggested means of accommodating the interests of the courts and litigants. Id. at 258 - 259.

---

[1] In commenting upon changes in opinion writing practices, the Commission expressed specific concern with the questioned Rule 21, observing as follows:

> "Of greater significance is the extent to which decisions are rendered without any indication of the reasoning impelling the result. In the Fifth Circuit, Local Rule 21, a relatively recent innovation, provides the judge with a form opinion, appropriate for use without variation or modification. It reads, in its entirety, 'Affirmed [Enforced]. See Local Rule 21.' Hundreds of opinions during fiscal 1974 contained no more save for citation of an opinion announcing the rule and explaining its purpose."

The Fifth Circuit has not only continued its heavy utilization of this "form opinion", but it is becoming increasingly the practice in other circuits as well.

The Commission noted:

> ". . . but in each case the litigants and their attorneys would be apprised of the reasoning which underlies the conclusion of the court". Id. at 258. (Emphasis added.)

The Fifth Circuit's practice of affirmance without opinion presents significant questions in the administration of justice in the federal judicial system. This Court should grant certiorari to address those questions.

II. THE DECISION AND RULINGS BELOW ARE IN DIRECT CONFLICT WITH FEDERAL RULE OF EVIDENCE 704. CERTIORARI SHOULD BE GRANTED TO RESOLVE THIS IMPORTANT QUESTION OF THE INTERPRETATION AND APPLICATION OF THE FEDERAL RULES OF EVIDENCE.

Federal Rule of Evidence 704 states:

> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." (Emphasis added.)

Yet, the Trial Court refused to allow Petitioners' expert witness, well qualified in the field of railroad crossing safety, to express his opinion that the railroad crossing in question was unusually hazardous. Although Petitioners' expert had been found qualified to testify as an expert witness on the subject of necessary safety precautions at railroad crossings, his testimony as to the unusually hazardous nature of this particular crossing was disallowed by the Trial Judge on the ground that such an opinion would go to the ultimate factual question and would invade the province of the jury.

Petitioners' theory at trial was that the Railroad had failed to exercise the requisite degree of care by neglecting to erect and maintain sufficient safety devices at the crossing so as to protect and warn motorists approaching the crossing. This theory was premised on the fact that a railroad may well be under a duty to provide special warnings in addition to those required by statute where the crossing is unusually hazardous. Louisville & Nashville Railroad Company v. Williams, 370 F.2d 839 (5th Cir. 1966); Callaway v. Adams, 252 Ala. 136, 40 So.2d 73 (1949).

Assuming, arguendo, that the offered opinion of Petitioners' expert (that this particular crossing was unusually hazardous) embraced an ultimate issue, the Trial Court's disallowance of this opinion as invading the province of the jury clearly shows a misapplication of, or failure to apply, Federal Rule of Evidence 704. The summary affirmance of this ruling by the Court of Appeals for the Fifth Circuit demonstrates the need for this Honorable Court to grant this petition in order to mandate compliance with the Federal Rules of Evidence.

Petitioners submit there is presented herein an important question involving the interpretation and application of Rule 704 of the Federal Rules of Evidence appropriate for review. The issuance of a Writ of Certiorari to the Court of Appeals for the Fifth Circuit is vital in order to assure the application and viability of the Federal Rules of Evidence in the district courts of this circuit.

CONCLUSION

This is an appropriate case for this Court to address the increasingly prevalent practice of the Courts of Appeals to affirm without opinion and also an opportunity to ensure the vitality of Rule 704 of the Federal Rules of Evidence.

Respectfully submitted,

BERT S. NETTLES
Post Office Box 2232
Mobile, Alabama 36601
Attorney for Petitioners
R & T Construction Company, Inc.
and Darrel S. Pitts

OF COUNSEL:

ROBERT H. ALLEN, J. HARLEY McDONALD, Jr.,
and NETTLES, COX AND BARKER
Post Office Box 2232
Mobile, Alabama 36601
For R & T Construction Company, Inc.,
and Darrel S. Pitts

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari have been served on Broox G. Holmes and Norman E. Waldrop, Jr., Attorneys for Respondent, by delivering copies to them at their office at 1101 Merchants National Bank Building, Mobile, Alabama, on the ____ day of August, 1979.

BERT S. NETTLES

APPENDIX A

OPINIONS OF THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
FIFTH CIRCUIT

Edward W. Wadsworth
Clerk

OFFICE OF THE CLERK

Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

May 30, 1979

TO ALL PARTIES LISTED BELOW:

No. 78-1830 - ST. LOUIS-SAN FRANCISCO RAILWAY CO. v. R & T CONSTRUCTION CO., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk

By Sally Hayward
Deputy Clerk

cc: Messrs. Bert S. Nettles
Robert H. Allen
J. Harley McDonald, Jr.
Messrs. Broox G. Holmes
Norman E. Waldrop, Jr.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-1830
Summary Calendar*

Do Not Publish

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation,

Plaintiff-Appellee,

versus

R & T CONSTRUCTION COMPANY, INC., a corporation, and DARREL S. PITTS, an individual,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Alabama

(APRIL 24, 1979)

Before COLEMAN, FAY and RUBIN, Circuit Judges

PER CURIAM: AFFIRMED. See Local Rule 21. [1]

*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX B

OPINIONS OF THE UNITED STATES DISTRICT

COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA.
SOUTHERN DIVISION

ST. LOUIS-SAN FRANCISCO RAILWAY CO., Plaintiff,	)	CIVIL ACTION NO. 77-340-P
vs.	)	
R & T CONSTRUCTION CO., INC., A Corporation, et al., Defendants.	)	

MOTION FOR NEW TRIAL
AND MOTION TO STAY EXECUTION

Defendants move the court to set aside the judgment entered herein on the 22nd day of February, 1978, and to grant a new trial on the following grounds:

1. That prejudicial error was committed in refusing to allow William S. Pipas, the expert witness presented by defendants, to testify that in his opinion the railroad grade crossing in question was unusually hazardous.

2. That prejudicial error was committed in refusing to allow William S. Pipas, the expert witness presented by defendants, to testify that his opinion testimony concerning the railroad grade crossing in question was based in part upon an authoritative committee report published in the proceedings of the 49th Annual Convention of the American Railway Engineering Association held in 1950, Volume 51, Page 204.

3. That prejudicial error was committed in refusing to allow William S. Pipas, the expert witness presented by defendants, to testify on re-direct examination that his opinion testimony concerning the railroad grade crossing in question was based in part upon the authoritative committee report referred to in ground 2 above even after opposing counsel had himself gone into the matter and cross-examined Mr. Pipas relative to the conclusions of a similar committee report.

4. That prejudicial error was committed in refusing to allow William S. Pipas, the expert witness presented by defendants, to testify that it was the customary standard and practice of railroads to insure that advance warning signs and pavement markings were placed at railroad grade crossings such as the one in question.

5. That prejudicial error was committed in directing the jury to find that defendants were guilty of simple negligence.

Further, defendants move the court for an order staying execution of or any proceeding to enforce the judgment entered in favor of the plaintiff herein on February 22, 1978, pending disposition of defendants' motion for a new trial.

Bert S. Nettles

Robert H. Allen

M. A. Marsal by Bert S. Nettles

Attorneys for Defendants

OF COUNSEL:

BRYAN, NELSON, NETTLES & COX
3311 First National Bank Bldg.
Mobile, Alabama 36602

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all parties in the foregoing matter with a copy of this pleading by hand delivering the same to them on this the 3rd day of March, 1978.

BERT S NETTLES

U.S. District Court Sou. Dist. Ala.
Filed in Clerk's Office
Mar 3 1978
William J. O'Connor, Clerk

Motion Denied
3/8/78
V. Pittman

IN THE UNITED STATES DISTRICT COURT FOR THE
FOR THE SOUTHERN DISTRICT OF
ALABAMA

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff	:	CIVIL ACTION NO. 77-340-P
-vs-	:	
R & T CONSTRUCTION CO. INC., ET AL, Defendants.	:	

Now on this 16th day of February, 1978 to try the issue joined between the parties in this case comes the jury of 7 good and lawful persons, which includes 1 alternate, who were duly selected, but not sworn, on the 13th day of February, 1978. Said jury is duly sworn according to law and the trial of this case is begun.

Witnesses are examined, exhibits are offered in evidence and the trial of this case not being completed at 5:00 P.M., Court recessed to Friday, February 17, 1978 at 9:00 A.M.

Now on this 17th day of February, 1978 to try the issue joined between the parties in this case comes the jury of 7 good and lawful persons, which includes 1 alternate, who were duly sworn on the 16th day of February, 1978 and the trial of this case is resumed.

Witnesses are examined, exhibits are offered in evidence and the plaintiff rests. Witnesses are examined and exhibits offered on behalf of the defendants and the trial of this case not being completed at 5:00 P.M., Court recessed to Monday, February 20, 1978 at 9:30 A.M.

Now on this 20th day of February, 1978 to try the issue joined between the parties in this case comes the jury of 7 good and lawful persons, which includes 1 alternate, who were duly sworn on the 16th day of February, 1978 and the trial of this case is resumed. Witnesses are examined, exhibits offered in evidence and the trial of this case not being completed at 4:10 P.M., Court recessed to Tuesday, February 21, 1978 at 9:00 A.M.

Now on this the 21st day of February, 1978 to try the issue joined between the parties in this case comes the jury of 7 good and lawful persons, which includes 1 alternate, who were duly sworn on the 16th day of February, 1978 and the trial of this case is resumed. Witnesses are examined, exhibits offered in evidence and all parties rest. The trial of this case not being completed at 2:35 P.M., Court recessed to Wednesday, February 22, 1978.

Now on this 22nd day of February, 1978 to try the issue joined between the parties in this case comes the jury of 7 good and lawful persons, which includes 1 alternate, who were duly sworn on the 16th day of February, 1978 and the trial of this case is resumed. Closing arguments are made to the jury, the Court charges the jury and the jury begins their deliverations.

Now comes the jury having heard the evidence, the arguments of counsel, the charge of the Court and having considered the same upon their oaths do say:

"We, the jury find for the plaintiff, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, and against the defendants, R & T CONSTRUCTION COMPANY, INC., a corporation, and DARREL S. PITTS, and assess its damages at $490,000.00.

Nina T. Rawls
FOREMAN"

It is therefore ADJUDGED that a judgment be, and the same hereby is, entered in favor of the plaintiff, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, against the defendants, R & T CONSTRUCTION COMPANY, INC., a corporation, and DARREL S. PITTS, in the amount of

FOUR HUNDRED NINETY THOUSAND and NO/100 ($490,000.00) DOLLARS, together with costs, for which execution may issue.

Virgil Pittman
Chief Judge

U. S. DISTRICT COURT
SOU. DISTRICT OF ALABAMA
FILED AND ENTERED THIS THE
22ND DAY OF FEBRUARY, 1978
MINUTE ENTRY NO. 45,780 - B
WILLIAM J. O'CONNOR, CLERK
BY — G. Walter
Deputy Clerk

U.S. District Court Sou. Dist. Ala.
Filed in Clerk's Office
Feb 24 1978
William J. O'Connor, Clerk

Supreme Court, U. S.
FILED
OCT 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-301

R & T CONSTRUCTION COMPANY, INC.,
and DARRELL S. PITTS,
Petitioners,

versus

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

BROOX G. HOLMES
Post Office Box 290
Mobile, Alabama 36601

Attorney for Respondent

NORMAN E. WALDROP, JR.
CHRISTOPHER I. GRUENEWALD
Armbrecht, Jackson, DeMouy,
Crowe, Holmes & Reeves
Post Office Box 290
Mobile, Alabama 36601

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53098, N. O., LA. 70153 - 504/822-1611

INDEX

Page

AUTHORITIES i

QUESTIONS PRESENTED 1

FEDERAL RULES INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 9

CONCLUSION 16

CERTIFICATE OF SERVICE 17

APPENDIX 1a

TABLE OF AUTHORITIES

CASES:

Arcement v. Southern Pacific Transportation Co., 517 F.2d 729 (5th Cir. 1975) 14

Construction, Ltd. v. Brooks-Skinner Building Co., 488 F.2d 427 (3d Cir. 1973) 11

International Halliwell Mines, Ltd. v. Continental Copper and Steel Industries, Inc., 544 F.2d 105 (2d Cir. 1976) 12

Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975) 11

Louisville and Nashville R. Co. v. Williams, 370 F.2d 839 (5th Cir. 1966) 10

N.L.R.B. v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970) 15

TABLE OF AUTHORITIES (Continued)

Page

Taylor v. McKeithen, 407 U.S. 191 (1972) 14

United Telecommunications, Inc. v. American Television and Communications Corp., 536 F.2d 1310 (10th Cir. 1976) 12,13

OTHER AUTHORITIES:

Fed. R. App. P. 36 15

Fed. R. App. P. 41 15

Fed. R. App. P. 47 15

Fed R. Evid. 103 13

Fed. R. Evid. 403 11,12

Fed. R. Evid. 702 11

Fed. R. Evid. 704 9,10,13

Local Rule 13 of the United States Court of Appeals for the District of Columbia Circuit 15

Local Rules 12 and 14 of the United States Court of Appeals for the First Circuit 15

Local Rule §0.23 of the United States Court of Appeals for the Second Circuit 15

Local Rule 16 of the United States Court of Appeals for the Third Circuit 15

Local Rule 7 of the United States Court of Appeals for the Fourth Circuit 15

TABLE OF AUTHORITIES (Continued)

Page

Local Rule 21 of the United States Court of Appeals for the Fifth Circuit 14,15,16

Local Rule 9 of the United States Court of Appeals for the Sixth Circuit 15

Local Rule 35 of the United States Court of Appeals for the Seventh Circuit 15

Local Rule 14 of the United States Court of Appeals for the Eighth Circuit 15

Local Rule 21 of the United States Court of Appeals for the Ninth Circuit 15

Local Rule 17 of the United States Court of Appeals for the Tenth Circuit 15

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-301

R & T CONSTRUCTION COMPANY, INC.,
and DARRELL S. PITTS,
Petitioners,

versus

ST. LOUIS-SAN FRANCISCO RAILWAY
COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the trial court erred in excluding expert testimony offered by Petitioners which would have been unfairly prejudicial to Respondent, would not have aided the jury, and would have been cumulative of other evidence in the case?

2. Whether the practice of the various United States Courts of Appeals of affirming without opinion in certain cases, and particularly the practice of the United States Court of Appeals for the Fifth Circuit as embodied in Local Rule 21 thereof, is a proper, permissible and necessary exercise of the discretion accorded those courts in the matter of whether and how to write opinions?

FEDERAL AND LOCAL RULES INVOLVED

Federal Rule of Appellate Procedure 36, 28 U.S.C.

Federal Rule of Appellate Procedure 41, 28 U.S.C.

Federal Rule of Appellate Procedure 47, 28 U.S.C.

Federal Rule of Evidence 103, 28 U.S.C.

Federal Rule of Evidence 403, 28 U.S.C.

Federal Rule of Evidence 702, 28 U.S.C.

Federal Rule of Evidence 704, 28 U.S.C.

Local Rule 13 of the United States Court of Appeals for the District of Columbia Circuit, 28 U.S.C.

Local Rules 12 and 14 of the United States Court of Appeals for the First Circuit, 28 U.S.C.

Local Rule §0.23 of the United States Court of Appeals for the Second Circuit, 28 U.S.C.

Local Rule 16 of the United States Court of Appeals for the Third Circuit, 28 U.S.C.

Local Rule 7 of the United States Court of Appeals for the Fourth Circuit, 28 U.S.C.

Local Rule 21 of the United States Court of Appeals for the Fifth Circuit, 28 U.S.C.

Local Rule 9 of the United States Court of Appeals for the Sixth Circuit, 28 U.S.C.

Local Rule 35 of the United States Court of Appeals for the Seventh Circuit, 28 U.S.C.

Local Rule 14 of the United States Court of Appeals for the Eighth Circuit, 28 U.S.C.

Local Rule 21 of the United States Court of Appeals for the Ninth Circuit, 28 U.S.C.

Local Rule 17 of the United States Court of Appeals for the Tenth Circuit, 28 U.S.C.

The pertinent texts of the foregoing rules are set forth in the appendix to this brief.

STATEMENT OF THE CASE

Respondent, St. Louis-San Francisco Railway Company, filed its complaint against Petitioners, R & T Construction Co., Inc. and Darrell S. Pitts, in the United States District Court for the Southern District of Alabama, Southern Division, on June 20, 1977 (R. 1-2). Respondent alleged in the complaint that on or about June 14, 1977, Respondent was operating a railroad train on a railroad track which crossed a county road in Mobile County, Alabama, and that the Petitioners, R & T Construction Co., Inc. and Darrell S. Pitts, so negligently and/or wantonly operated a motor vehicle

so as to cause the motor vehicle to collide with Respondent's train at the crossing, destroying two of Respondent's railroad locomotives and the caboose of the train and inflicting extensive damage to the Respondent's railroad tracks, the road bed and the railroad crossing signs (R. 1-2). Plaintiff claimed damages of Petitioners in the amount of $600,000.00 (R. 2). On July 15, 1977, the Petitioners, R & T Construction Co., Inc. and Darrell S. Pitts, filed their answer to Respondent's complaint, and Petitioner, Darrell S. Pitts, filed his counterclaim (R. 8-11). The Petitioners denied that they were negligent and/or wanton in any respect, and alleged that Respondent was contributorily negligent (R. 8-9). In his counterclaim, Darrell S. Pitts alleged that Respondent was guilty of negligence and/or wantonness in its maintenance of the crossing and the signs marking the crossing, and in causing or allowing its train to collide with the motor vehicle being operated by Petitioner Pitts, resulting in personal injuries to Pitts (R. 9-10). On August 2, 1977, Respondent replied to the counterclaim of Darrell S. Pitts, denying all negligence and/or wantonness, and alleging contributory negligence on the part of Darrell S. Pitts (R. 14-15). On August 5, 1977, Petitioner, R & T Construction Company, Inc., amended its answer to add a counterclaim against Respondent, wherein it alleged that Respondent was guilty of negligence and/or wantonness in its maintenance of the crossing and the signs marking the crossing, and in causing or allowing its train to collide with Petitioner R & T Construction Company's tractor and trailer, causing damage to the

tractor and trailer (R. 16-17). On October 31, 1977, Respondent filed its answer to the counterclaim of Petitioner, R & T Construction Company, Inc., denying all negligence and/or wantonness, and alleging that Petitioner, R & T Construction Company, Inc., was contributorily negligent and guilty of wantonness (R. 102-103).

The incident giving rise to this action was a collision which occurred when a heavily laden tractor-trailer truck owned by Petitioner, R & T Construction Company, Inc., was driven by Petitioner, Darrell S. Pitts, into the side of a train owned by Respondent, St. Louis-San Francisco Railway Company (T. 9-10, 21, 27). The collision took place in a rural area in Mobile County, Alabama, on June 14, 1977, at approximately 4:50 p.m. (T. 8-9, 559). The day of the accident was a bright, sunny day (T. 9). Respondent's train, pulled by four locomotives, was travelling in a southbound direction (T. 26, 140-141), and the vehicle being driven by Petitioner, Darrell S. Pitts, was travelling in an easterly direction on Radcliff Road (T. 26, 111), toward a point where the track in question crosses Radcliff Road. On either side of the railroad track, on the highway right-of-way, there were crossbuck railroad markers and warning signs (T. 12; Plaintiff's Exhibit 17, T. 4), and bright red stop signs approximately 30 feet from the railway bed (T. 36; Plaintiff's Exhibit 17, T. 4). A vehicle stopping at the stop sign could see up and down the tracks for a long distance (T. 74, 197-199, 537; Plaintiff's Exhibit 59, T. 6). The road at this point is straight and level (T.

180, 532), and the tracks crossing the road are straight and level for a long distance (T. 141, 531-532). There were no curves (T. 141, 180, 531-532).

Petitioner, Darrell S. Pitts, the driver of the truck, was very familiar with the crossing in question, having crossed it at least three or four times that very day (T. 93), and having, by his own estimate, crossed it at least 170 times during the months preceding the accident (T. 98). The crossing had been in existence for approximately one year (T. 140).

The train approached the crossing where the accident occurred at a speed of approximately 40 miles per hour (T. 150), which is the speed prescribed by the regulations of the St. Louis-San Francisco Railway Company (T. 207, 210). There is no speed limit set by governmental authority. The speed of the train is undisputed since it was recorded by a recording device installed on the train for that purpose (T. 150, 203-208). The engineer of the train, in accordance with normal procedure, began sounding the whistle and bell of the train at a point more than a quarter of a mile from the crossing, and continued to sound the whistle and the bell until the collision occurred (T. 142-144, 146). In addition to the engineer's testimony, there was testimony from a disinterested witness that the whistle was sounded (T. 181-183). The engineer saw the truck when the train had reached a point approximately 50 feet from the crossing (T. 141). At that time, the engineer estimated that the truck was approximately 100 to

150 yards from the crossing (T. 147). The engineer estimated the speed of the truck to be 50-60 miles per hour when he first saw the truck (T. 156), and from 30-40 miles an hour when the collision occurred (T. 149). The engineer applied the emergency brake of the train when he realized the truck might not be able to stop before hitting the train (T. 158).

The truck, owned and driven by the respective Petitioners, was a flatbed tractor-trailer rig approximately 55 feet in length (T. 606). At this particular time, it was loaded with heavy oil drilling casing pipe (T. 630). The weight of the cargo carried by the truck was approximately 45,000 pounds (T. 261), and the weight of the tractor and trailer was approximately 28,000 pounds (T. 261), for a total weight of approximately 73,000 pounds (T. 261).

By his own testimony, Petitioner, Darrell S. Pitts, had no intention of stopping at the crossing (T. 118-119, 631), despite the fact that there was an Alabama stop sign at the crossing, and he was aware of the fact that failure to stop would be a violation of Alabama law (T. 124). The truck brakes were first applied at a point approximately 233 feet from the point of impact, as demonstrated by the skid marks left by the truck (T. 19, 21; Plaintiff's Exhibit 16, T. 4). Although the brakes were applied some 233 feet before the truck reached the crossing, the truck was still travelling at such a high rate of speed when it struck the train that two locomotives were practically destroyed (T. 25, 151, 227-

230; Plaintiff's Exhibits 1-15, T. 3), one of them was knocked from the tracks (T. 151, 226), a caboose was knocked from the tracks (T. 151, 226), 1,600-pound pipes were hurled into the air and over the top of the train (T. 21-22, 335, 415, 608), the crossing was damaged (T. 235), the truck was demolished (T. 601-602; Plaintiff's Exhibits 20-22, T. 4), the passenger in the cab of the truck was killed (T. 9-10), and Petitioner, Darrell S. Pitts, was severely injured (T. 9-10). The truck hit the train between the third and fourth locomotives pulling the train (T. 27). Since each locomotive is almost 60 feet long (T. 151), approximately 180 feet of the train had already passed through the crossing at the time the train was struck by the truck.

The case was tried to a jury before the Honorable Virgil Pittman, United States District Judge for the Southern District of Alabama. The trial lasted five days, and approximately twenty-three witnesses were examined. At the close of the evidence, the trial court determined as a matter of law that both Petitioners were guilty of negligence and contributory negligence (R. 276-278; T. 637). The Court submitted the remaining issues to the jury on special interrogatories, and the jury found that both Petitioners were guilty of wantonness and that such wantonness proximately contributed to the injuries of Respondent, that Respondent was neither negligent nor wanton, and that Respondent was entitled to recover from Petitioners the sum of $490,000.00 (R. 274-275; T. 784-786). On February 24, 1978, judgment was entered on the verdict.

On March 3, 1978, Petitioners filed a motion for a new trial (R. 338-339), which was denied on March 8, 1978 (R. 338). On April 4, 1978, notice of appeal was filed by both Petitioners (R. 349). Briefs were filed, and on April 24, 1979, the Fifth Circuit Court of Appeals affirmed *per curiam* the judgment of the District Court. Petitioners then filed petitions for rehearing and rehearing *en banc*, both of which were denied on May 30, 1979. Petition for Writ of Certiorari to this Court was filed on August 24, 1979.

ARGUMENT

I.

The Decision On The Merits Below Is Clearly Correct.

Petitioners contend that the Court below erred in failing to reverse the verdict and judgment because of the trial court's exclusion of the opinion of Petitioner's expert witness that the crossing where the accident occurred was "unusually hazardous". Petitioners contend that the trial court's ruling is in conflict with Federal Rule of Evidence 704. The record of the trial, however, demonstrates that there is no such conflict, and the decision of the Court below is therefore clearly correct.

Federal Rule of Evidence 704 requires that an opinion embracing an ultimate issue be "otherwise admis-

sible" to be admitted. Respondent pointed out to the Court below that the proffered testimony was not "otherwise admissible" within the meaning of Rule 704, since there were at least three sufficient and distinct grounds for excluding the testimony.

First, it clearly appears from the transcript of the trial that the trial court, at the time the testimony was offered, felt that a conclusory statement from Petitioners' expert witness that the crossing was "unusually hazardous" would be unduly prejudicial to Respondent. The reason for the trial court's concern was that the cases relied upon by Petitioners in support of their "unusually hazardous crossing" theory were factually distinguishable from the facts which form the basis of this proceeding, in that the various criteria set forth in those cases for application of the doctrine (*See, e.g., Louisville and Nashville R. Co. v. Williams*, 370 F.2d 839 (5th Cir. 1966) (impaired visibility of signs, view to crossing obstructed or obscured, motorist unfamiliar with crossing)), were absent here, thereby bringing into doubt the very applicability of the doctrine as a matter of law.[1]

---

1 The concern of the trial court regarding possible prejudice to Respondent is obvious. Thus, the trial court agreed with Respondent that the "unusually hazardous crossing" cases were factually distinguishable from the situation involved in this case, and that different questions were involved. (T. 467.) The trial court therefore determined to allow Petitioners the benefit of the doctrine only ". . . under the restrictions I have indicated" (T. 467) (i.e., without a conclusory statement from Petitioners' expert as to the allegedly "unusually hazardous" nature of the crossing), and was extremely careful in its oral charge to apprise the jury of the limitations of the doctrine. (T. 743-745.)

Under Federal Rule of Evidence 403, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of "unfair prejudice . . .", and the trial court possesses broad discretion in making such a determination. *Construction, Ltd. v. Brooks-Skinner Building Co.*, 488 F.2d 427 (3d Cir. 1973). The probative value of the opinion would have been negligible since the Petitioners' expert was allowed to express opinions as to every aspect of the particular crossing in question (T. 505, 508, 567, 571-72), and was generally allowed considerable latitude in his testimony. Additionally, the trial court gave three written charges at the request of Petitioners on the "unusually hazardous crossing" doctrine. (T. 759-760). It is clear that the trial court was justified in concluding that the testimony in question would have been of little probative value, given the extensive education of the jury on the unusually hazardous crossing doctrine and the alleged deficiencies in the crossing, and that this negligible probative value was substantially outweighed by the danger of unfair prejudice to Respondent, thereby warranting exclusion.

Second, Respondent pointed out to the Court below that the proffered opinion would not have assisted the trier of fact as required by Federal Rule of Evidence 702. The trial court possesses broad discretion in determining whether or not a particular opinion will be helpful to the jury. *Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975). There is no doubt that the jury in this

case, following careful and thorough instruction by the trial court concerning the "unusually hazardous crossing" doctrine, was as qualified as Petitioners' expert to draw such a conclusion if the evidence warranted it. The jurors were given an abundance of testimony, photographs, and documents by both Petitioners and Respondent upon which they could base such a determination. The jury was entirely capable of drawing the correct inference from the evidence presented and required no further "expert" opinion testimony from Petitioners' witness to aid it in its deliberations. *See United Telecommunications, Inc. v. American Television and Communication Corp.*, 536 F.2d 1310 (10th Cir. 1976).

Finally, as Respondent pointed out to the Court below, the testimony in question would clearly have been cumulative of numerous other opinions by the expert as to the allegedly "blind" nature of the crossing and its various other alleged deficiencies, and would, in addition, have been cumulative of the testimony of at least four of Petitioners' other witnesses who were allowed to express their opinions as to the allegedly unsafe nature of the crossing. (T. 319, 346, 383, 599). The trial court has broad discretion in determining whether or not to admit testimony which is cumulative. Rule 403, *Federal Rules of Evidence; International Halliwell Mines, Ltd. v. Continental Copper and Steel Industries, Inc.*, 544 F.2d 105, 109 (2d Cir. 1976). The cumulative nature of the proffered testimony clearly provided a sufficient ground for its exclusion.

When the trial court excludes evidence, the ruling must be upheld if there was any ground upon which the evidence was not admissible, whether specified or not. *United Telecommunications, Inc. v. American Television and Communications Corp.*, 536 F.2d 1310 (10th Cir. 1976), at 1318 n.6. There were at least three such grounds in this case. Since these grounds existed, the proffered opinion was not "otherwise admissible" within the meaning of Federal Rule of Evidence 704, and the trial court's ruling therefore in no way conflicts with the rule.

Respondent also pointed out to the Court below that assuming, *arguendo*, that the ruling in question was erroneous, the error was clearly harmless and without prejudice to Petitioners, therefore providing no basis for reversal. Rule 103(a), *Federal Rules of Evidence*. The reason that any such error could not have prejudiced Petitioners is that the evidence ultimately elicited at trial was overwhelmingly against Petitioners and in favor of Respondent, as is apparent from the facts set out in a previous portion of this brief. Based upon the evidence, the trial court found as a matter of law that the Petitioners were guilty of negligence and contributory negligence, and the jury, while absolving the Respondent of all negligence, found the Petitioners to be guilty of wanton misconduct. Given the evidence finally brought out, it is inconceivable that one conclusory statement from Petitioners' expert could have had the slightest effect upon the determination of the jury. This position is buttressed by the fact that the

jury had the benefit of numerous opinions from Petitioners' expert and others as to the allegedly unsafe condition of the crossing and the further benefit of extensive charges as to Petitioners' theory of the case. The jury simply (and correctly) chose not to draw the conclusions urged upon it by Petitioners, and obviously would have so chosen in any event. *See Arcement v. Southern Pacific Transportation Co.*, 517 F.2d 729 (5th Cir. 1975).

Respondent respectfully submits that the decision below was clearly and without question correct, since there is nothing in the record upon which a reversal could be predicated.

II.

There Is No Important Question Presented Regarding Local Rule 21 Of The United States Court Of Appeals For The Fifth Circuit.

Petitioners question the authority of the Court below to affirm without opinion in appropriate cases. However, this Court has specifically recognized the broad discretion which Courts of Appeals have in the matter of whether or how to write opinions, especially with respect to summary affirmances. *Taylor v. McKeithen*, 407 U.S. 191 (1972), at 194 n.4. The Court's remarks in the *Taylor* case were directed to Local Rule 21 of the United States Court of Appeals for the Fifth Circuit as it existed at that time, which was substan-

tially similar to the rule which petitioners attempt to put in issue in this case. Additionally, this Court recognized in the Rules of Appellate Procedure promulgated by it the authority of the Courts of Appeals to formulate such rules as the one here in issue. Rules 36, 41 and 47, *Federal Rules of Appellate Procedure*. The practice of affirming without opinion embodied in Local Rule 21 of the United States Court of Appeals for the Fifth Circuit is therefore a permissible exercise of the Court's discretion, as well as a necessary one. The basis for such a rule, and the necessity therefor, are clearly set forth in *N.L.R.B. v. Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970).

Petitioners, however, would have this Court direct the Court below to render opinions in every case coming before it. The very statement of this position demonstrates its unworkability and lack of realism. Additionally, since the Court below is by no means the only Court of Appeal to recognize the necessity and wisdom of affirmance without opinion in appropriate cases,[2]

---

2 All eleven circuits have local rules which explicitly or implicitly recognize the power of the Court to affirm without opinion in certain cases. *See* Local Rule 13 of the United States Court of Appeals for the District of Columbia Circuit; Local Rules 12 and 14 of the United States Court of Appeals for the First Circuit; Local Rule §0.23 of the United States Court of Appeals for the Second Circuit; Local Rule 16 of the United States Court of Appeals for the Third Circuit; Local Rule 7 of the United States Court of Appeals for the Fourth Circuit; Local Rule 21 of the United States Court of Appeals for the Fifth Circuit; Local Rule 9 of the United States Court of Appeals for the Sixth Circuit; Local Rule 35 of the United States Court of Appeals for the Seventh Circuit; Local Rule 14 of the United States Court of Appeals for the Eighth Circuit; Local Rule 21 of the United States Court of Appeals for the Ninth Circuit; Local Rule 17 of the United States Court of Appeals for the Tenth Circuit.

the disruption of the entire federal appellate system which would result from the adoption of the untenable position urged by Petitioners would be disastrous in terms of docket control, especially in view of the complete and utter lack of necessity for written opinions in many cases.

Local Rule 21 was properly applied in the instant case. The evidence was overwhelmingly in favor of Respondent; there was clearly no error of law; and an opinion would have had no precedential value.

Since this Court has already specifically spoken to the authority of the Court below to affirm without opinion in appropriate cases, and since the rule in question was properly applied in this case, Petitioners have posed no question requiring decision by this Court.

CONCLUSION

Respondent respectfully submits that for the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BROOX G. HOLMES
Attorney for Respondent,
St. Louis-San Francisco
Railway Company

OF COUNSEL:

NORMAN E. WALDROP, JR.
CHRISTOPHER I. GRUENEWALD
ARMBRECHT, JACKSON, DeMOUY,
CROWE, HOLMES & REEVES
Post Office Box 290
Mobile, Alabama 36601

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of October, 1979, I served three copies of the foregoing brief on Bert S. Nettles, Attorney for Petitioners, by mailing same to him at Post Office Box 2232, Mobile, Alabama, 36601, by United States mail in an envelope properly addressed with first class postage prepaid.

BROOX G. HOLMES

APPENDIX

TEXT OF RULES INVOLVED IN THIS CASE

Federal Rule of Appellate Procedure 36 provides:

Rule 36. *Entry of Judgment.*

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is *rendered without an opinion,* the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, *if any,* or of the judgment *if no opinion was written,* and notice of the date of entry of the judgment. (Emphasis added).

Federal Rule of Appellate Procedure 41 provides, in part:

Rule 41. *Issuance of Mandate; Stay of Mandate.*

(a) *Date of Issuance.* The mandate of the court shall issue 21 days after the entry of the judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court,

if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order. (Emphasis added).

* * *

Federal Rules of Appellate Procedure 47 provides:

Rule 47. *Rules by Courts of Appeals.*

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

Federal Rule of Evidence 103 provides, in part:

Rule 103. *Rulings on Evidence.*

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . .

* * *

Federal Rule of Evidence 403 provides:

Rule 403. *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.*

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 702 provides:

Rule 702. *Testimony by Experts.*

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Evidence 704 provides:

Rule 704. *Opinion on Ultimate Issue.*

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Local Rule 13 of the United States Court of Appeals for the District of Columbia Circuit provides, in part:

Rule 13. *Opinions of the Court.*

* * *

(c) *Order Form of Decision.* In accordance with recommendations for improvement of judicial administration, this court may, while according full consideration of the issues, dispense with opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate, *e.g.*, affirmance by order of a decision of judgment of a court or administrative agency; a judgment, of affirmance or reversal, containing a notation of precedents, or accompanied by a brief memorandum. See Rule 8(f).

* * *

Local Rule 12 of the United States Court of Appeals for the First Circuit provides, in part:

Rule 12. *Summary Disposition.*

At any time, on such notice as the court may order, on motion of appellee or sua sponte, the court may dismiss the appeal or other request for relief or affirm and enforce the judgment or order below if the court lacks

jurisdiction, or if it shall clearly appear that no substantial question is presented. In case of obvious manifest error the court may, similarly, reverse. Motions for such relief should be promptly filed when the occasion appears, and must be accompanied by four copies of a memorandum or brief.

* * *

Local Rule 14 of the United States Court of Appeals for the First Circuit provides, in part:

Rule 14. *Opinions.*

Because of the increase in filings, the court finds itself unable to write opinions, or full opinions, in every case. The absence of such does not necessarily mean that the case is considered unimportant. It does mean that no new points of law, making the decision of general precedential value, are believed to be involved.

* * *

Local Rule §0.23 of the United States Court of Appeals for the Second Circuit provides, in part:

§0.23 *Dispositions in Open Court or by Summary Order.*

The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which

decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

* * *

Local Rule 16 of the United States Court of Appeals for the Third Circuit provides, in part:

Rule 16. *Opinions.*

(1) *Filing and Preservation.* All *written* opinions of the court and of the divisions thereof will be filed with the clerk and preserved by him. (Emphasis added).

* * *

Local Rule 7 of the United States Court of Appeals for the Fourth Circuit provides, in part:

Rule 7. *Pre-Argument Review; Certificates of Probable Cause; Summary Dismissal of Appeals and Denials of Certificates of Probable Cause; Notice to Appellant or Applicant of Right to File Informal Statement and Use of Same.*

* * *

(b) If all the judges of the panel to which a pending appeal has been referred conclude that the appeal is

wholly without merit, the appeal will be dismissed, or the judgment affirmed. If all the judges of the panel to which a pending appeal has been referred conclude that the judgment below was in error, they may reverse, or vacate the judgment, or grant any other appropriate relief; but if any judge of such panel is of the opinion that the issue is debatable and that full briefing and oral argument would be enlightening, or otherwise of assistance, the case shall be set for a regular hearing.

If all the judges of the panel to which an application for a certificate of probable cause has been referred conclude that the certificate should not issue, the certificate will be denied; but if any judge of such panel is of the opinion that the issue is debatable and that full briefing and oral argument would be enlightening, or otherwise of assistance, the certificate will be issued and the case set for a regular hearing.

A pending appeal may be dismissed, or the judgment appealed from affirmed, reversed, or vacated, or other appropriate relief granted before the filing of briefs or before oral argument. In the case of an appeal from the denial of a writ of habeas corpus, such summary action may be taken contemporaneously with, or at any time after, action upon the application for a certificate of probable cause.

* * *

Local Rule 21 of the United States Court of Appeals for the Fifth Circuit provides:

Rule 21. *Affirmance without Opinion.*

When the Court determines that any one or more of the following circumstances exist and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, or (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

Local Rule 9 of the United States Court of Appeals for the Sixth Circuit provides:

Rule 9. *Docket Control.*

(a) In the interest of docket control the Chief Judge may from time to time, in his discretion, appoint a panel

or panels to review pending cases, or motions pending in such cases, for appropriate assignment or disposition under this rule or any other rule of the Court.

(b) If, upon the consideration of any interlocutory motion or as a result of a review under subsection (a) of this rule, the Court concludes:

1. that the appeal is not within the jurisdiction of the Court;

2. that the appeal is frivolous and entirely without merit;

3. that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument; or

4. that clear error or an intervening decision of this Court or the Supreme Court requires reversal or vacation of the judgment or order appealed from or a remand for additional proceedings; the panel may enter an appropriate order dismissing the appeal, affirming, reversing or vacating the judgment or order appealed from or remanding the cause for additional proceedings.

Local Rule 35 of the United States Court of Appeals for the Seventh Circuit provides, in part:

Rule 35. *Plan for Publication of Opinions of the Seventh Circuit Promulgated Pursuant to Resolution of the Judicial Conference of the United States.*

* * *

(a) *Policy.* It is the policy of this circuit to reduce the proliferation of published opinions.

(b) *Publication.* The court may dispose of an appeal by an order or by an opinion, which may be signed or per curiam. Orders shall not be published and opinions shall be published.

* * *

(2) Unpublished orders:

* * *

(iii) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order, such as "affirmed", "enforced", "reversed", "reversed and remanded", and so forth;

* * *

(c) *Guidelines for Method of Disposition.*

* * *

(2) Unpublished orders:

(i) May be filed after an oral statement of reasons has been given from the bench and may include only, or little more than, the judgment rendered in appeals which

(A) are frivolous or

(B) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

(aa) a controlling statute or decision determines the appeal;

(bb) issues are factual only and judgment appealed from is supported by evidence;

(cc) order appealed from is non-appealable or this court lacks jurisdiction or appellant lacks standing to sue; or

(ii) May contain reasons for the judgment but ordinarily not a complete nor

necessarily any statement of the facts, in appeals which

(A) are not frivolous but

(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

* * *

Local Rule 14 of the United States Court of Appeals for the Eighth Circuit provides:

Rule 14. *Affirmed or Enforced Without Opinion.*

When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case the court may in its discretion enter either of the following orders: "AFFIRMED. See Rule 14." or "ENFORCED. See Rule 14."

Local Rule 21 of the United States Court of Appeals for the Ninth Circuit provides, in part:

Rule 21. *Form and Publication of Disposition of Cases.*

(a) *Opinions, Memoranda, Orders, Publication.* Each written disposition of a matter before this court shall bear under the number in the caption an appropriate label, that is OPINION, MEMORANDUM, or ORDER.

A written reasoned disposition of a case which is intended for publication is an OPINION of the court. It may be an authored opinion or a per curiam opinion. A written reasoned disposition of a case which is not intended for publication is a MEMORANDUM. Any other disposition of a matter before the court is an ORDER. An ORDER or MEMORANDUM shall not reveal its author, nor shall its authorship be designated "Per Curiam".

PUBLICATION means making available for reporting by legal publishing companies, or for distribution to regular subscribers, written dispositions which have been printed as slip opinions, or copies of which have been prepared by any other means.

Publication as a matter of course shall apply only to opinions.

(b) *When Disposition to Be by Opinion.* Subject to subsection (d) hereof, a case shall not be disposed of by written opinion for publication unless it:

(1) Establishes, alters, modifies or clarifies a rule of law, or

(2) Calls attention to a rule which appears to have been generally overlooked, or

(3) Criticizes existing law, or

(4) Involves a legal or factual issue of unique interest or substantial public importance, or

(5) Relies in whole or in part upon a reported opinion in the case by a district court or an administrative agency, or

(6) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be reported or distributed to regular subscribers.

* * *

Local Rule 17 of the United States Court of Appeals for the Tenth Circuit provides, in part:

Rule 17. *Opinions.*

(a) It is unnecessary for the court to write opinions in every case. The disposition without opinion does not mean that the case is considered unimportant. It does mean that no new points of law, making the decision of value as a precedent, are believed to be involved.

(b) After argument when the court determines that one or more of the following circumstances exist and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and (4) that no error of law appears; the court may in its discretion and without written opinion enter either of the following orders: "AFFIRMED. See Rule 17(b)," or "ENFORCED. See Rule 17(b)".

* * *